

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 99-525V

August 2, 2007

Not to be Published

ROBERT LASCH,

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Petitioner,

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v.

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SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

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Respondent.

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Clifford J. Shoemaker, Vienna, VA, for petitioner.

Linda S. Renzi, Washington, DC, for respondent.

Entitlement; alleged
causation of MS from
hepatitis B vaccine;
no records ever filed

MILLMAN, Special Master

DECISION¹

Petitioner filed a petition dated July 28, 1999, under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., alleging that hepatitis B vaccine caused an unspecified

¹ Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, petitioner has 14 days to identify and move to delete such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access.

adverse reaction. In paragraph 4 of the petition, petitioner's counsel affirmed that he was in the process of obtaining the medical records to be filed.

However, in the eight years since filing the petition, petitioner has never filed a single medical record either in the form of a CD or a hard copy, much less an expert report. This case was included as part of the Omnibus proceeding concerning hepatitis B vaccine and demyelinating illnesses.

On March 8, 2007, in response to the undersigned's Order in the Omnibus cases, dated February 8, 2007, petitioner's counsel stated that he still does not have any records from petitioner. Petitioner's counsel asserts that this is a case of MS.

On April 9, 2007, the undersigned issued an Order to Show Cause why this case should not be dismissed by **June 1, 2007** for failure to prosecute.

On June 1, 2007, the undersigned granted petitioner's oral motion for an extension of time to file a response to the undersigned's Order to Show Cause until July 2, 2007.

On July 2, 2006, the undersigned granted petitioner's second motion for an extension of time to file a response to the undersigned's Order to Show Cause until August 2, 2007.

On August 2, 2007, petitioner filed a Motion for Judgment on the Record, stating, "Petitioner does not feel that he can prove causation, as he cannot find an expert to support causation in his case."

DISCUSSION

To satisfy his burden of proving causation in fact, petitioner must offer "(1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a

proximate temporal relationship between vaccination and injury.” Althen v. Secretary of HHS, 418 F. 3d 1274, 1278 (Fed. Cir. 2005). In Althen, the Federal Circuit quoted its opinion in Grant v. Secretary of HHS, 956 F.2d 1144, 1148 (Fed. Cir. 1992):

A persuasive medical theory is demonstrated by “proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury[,]” the logical sequence being supported by “reputable medical or scientific explanation[,]” *i.e.*, “evidence in the form of scientific studies or expert medical testimony[.]”

In Capizzano v. Secretary of HHS, 440 F.3d 1317, 1325 (Fed. Cir. 2006), the Federal Circuit said “we conclude that requiring either epidemiologic studies, rechallenge, the presence of pathological markers or genetic disposition, or general acceptance in the scientific or medical communities to establish a logical sequence of cause and effect is contrary to what we said in Althen....”

Without more, “evidence showing an absence of other causes does not meet petitioners’ affirmative duty to show actual or legal causation.” Grant, *supra*, at 1149. Mere temporal association is not sufficient to prove causation in fact. Hasler v. US, 718 F.2d 202, 205 (6th Cir. 1983), *cert. denied*, 469 U.S. 817 (1984).

Petitioner must show not only that but for the vaccine, he would not have had MS, but also that the vaccine was a substantial factor in bringing about his MS. Shyface v. Secretary of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999).

In petitioner’s petition, petitioner’s counsel states, at paragraph 4:

While the records are not available and/or ready for filing, counsel affirms that he is in the process of obtaining the medical records to be filed. The reasons for this delay include the fact that counsel is in the process of filing numerous claims for vaccine injury before

the August 6, 1999 deadline and is concerned about getting all claims filed in a timely fashion.

It is a long time since the August 6, 1999 deadline for filing these numerous claims and, yet, petitioner's counsel could not have been forthright when he affirmed he was in the process of obtaining the medical records to be filed since eight years have elapsed without his filing a single one. On March 8, 2007, petitioner's counsel admitted that he still did not have any records from petitioner. The undersigned questions what kind of process petitioner's counsel was engaged in to obtain the records, i.e., why petitioner's counsel sought petitioner's records from petitioner instead of from the medical doctors who treated him.

Since there is absolutely no proof in this case to support petitioner's allegations either in the form of medical records or medical expert opinion, petitioner has failed to make a prima facie case of proving that hepatitis B vaccine caused in fact his alleged MS.

CONCLUSION

Petitioner's petition is dismissed with prejudice. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment in accordance herewith.²

IT IS SO ORDERED.

August 2, 2007
DATE

s/Laura D. Millman
Laura D. Millman
Special Master

² Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.